SAPIEE GANI & ORS A

v.

NAIM CENDERA SDN BHD & ORS AND ANOTHER CASE

HIGH COURT SABAH & SARAWAK, MIRI B
RAVINTHRAN PARAMAGURU J
[CASES NO: 21-01-2009(MR)-1 & 21-02-2009(MR)-2]
31 MAY 2013

NATIVE LAW AND CUSTOM: *Land dispute - Native customary rights ('NCR') - Claim for - Whether established on balance of probabilities - Whether evidence of customs, traditions and oral history acceptable to prove NCR - Whether continuous occupation of land before 1958 proven - Whether there was a failure to prove lineage - Whether NCR proven* C

The first plaintiff applied for a declaration that the Sarawak Government had alienated his native customary rights ('NCR') land to the first defendant company without going through the process of extinguishment and compensation. The defendants contended that the land in question was a state land and that the plaintiffs or their ancestors had not acquired NCR over the said land. By the time of the trial, the first plaintiff had passed away and his son, the third plaintiff ('PW1') was substituted as the administrator. The first plaintiff claimed that he inherited the NCR land from his ancestors. It was pleaded that the first plaintiff's great grandfather, Serudin bin Abdullah, was the first person who entered the area in 1908, cleared the land, built a house and cultivated the land. The land was then said to have been handed down to the first plaintiff's grandfather (Tusin bin Serudin), then to the first plaintiff's father (Gani bin Tusin) and finally to the first plaintiff who was born in 1932. The defence produced a letter ('the said letter') written by the first plaintiff to the Superintendent of Lands and Surveys wherein the first plaintiff had applied for land on the ground that he did not possess any land of his own. The principal issue arising was whether the first plaintiff had acquired NCR over the said land. D E F G

Held (dismissing first plaintiff's claim):

(1) The Sarawak Land Code recognises NCR if natives can prove that they have been in continuous occupation of their land prior to 1 January 1958. As written records evidencing such settlement would be hard to come by, the only way that natives can prove their claim that they have acquired NCR is by relying on their customs, traditions and oral history. This type of evidence constitutes hearsay evidence, has been accepted by the court. (para 25) H I

(2) PW1 had not produced a shred of documentary evidence that his ancestors had cleared and cultivated the land in question prior to 1958. The absence of documentary evidence was not fatal by itself. However, the oral evidence tendered by PW1 and his witnesses were neither reliable nor persuasive. Further, the oral evidence even contradicted the pleaded case. Although there was no burden on a defendant to disprove the case for the plaintiff, the evidence of the first defendant's witnesses clearly rebutted the pleaded case of the first plaintiff. (para 25)

(3) PW1 failed to tender any documents proving lineage to Serudin bin Abdullah. In fact, during cross-examination, PW1 himself was not completely certain if he was a descendant of Serudin bin Abdullah. (para 26)

(4) During cross-examination, PW5 (the first plaintiff's nephew) agreed that the land was not cleared by Serudin bin Abdullah but by Tusin bin Serudin. The first plaintiff's pleaded case and PW1's evidence was that it was Serudin bin Abdullah who cleared the land. PW5's oral evidence contradicted the first plaintiff's pleaded case and PW1's evidence. (para 30)

(5) The cleared area depicted in the aerial photograph was not sufficient evidence to support the first plaintiff's claim. There was no evidence that the present houses on the land existed before 1958. Further, even if the aerial photographs depicted settlement prior to 1958, this case did not involve a communal claim. It was an individual claim. The first plaintiff had to prove that his family had been in continuous occupation of the land from before 1958. (para 31)

(6) PW5 agreed that PW1's family had settled in Marudi in the mid-1970's. Therefore, even if some remote ancestor had cleared the land in question, PW1 and his family had not been in continuous occupation of the land before 1958. PW1 had not tendered cogent and consistent oral history evidence to prove that it was his ancestor who had occupied and cleared the land before 1958. The former District Officer of Miri also testified that the first plaintiff came to the area in the 1970's. (para 32)

(7) The said letter conclusively disproved the first plaintiff's case that he possessed NCR on the said land. If the first plaintiff possessed NCR land in the area in question, it would be totally unnecessary to state that he did not have any land of his own and was cultivating on land belonging to others. The said letter was admissible in evidence as it was produced from the records of the Lands and Surveys Department. (para 37)

Case(s) referred to:

Jimi Mantali & Ors v. Superintendent of Lands & Surveys Samarahan Division & Anor [2011] 1 CLJ 1000 HC ***(refd)***

For the plaintiffs - Mekanda Singh Sandhu (Kalveet Singh Sandhu with him); M/s Sandhu & Co, Advocs
For the first defendant - Shankar Ram; M/s Thomas, Shankar Ram & Co, Advocs
For the 2nd & 3rd defendants - Saferi Ali; AG's Chambers

Reported by Amutha Suppayah

JUDGMENT

Ravinthran Paramaguru J:

Introduction

[1] This is a claim for declaration that the Sarawak Government had alienated native customary rights (NCR) land without going through the process of extinguishment and compensation. The land was alienated to the first defendant company. The second defendant is the Superintendent of Lands and Surveys, Miri Division. The third defendant is the Government of Sarawak. The defence of all the defendants is that the land in question is state land and that the plaintiffs or their ancestors had not acquired NCR over the said land.

Case For The Plaintiffs

[2] The original three plaintiffs are a family. The first plaintiff, now deceased, is the husband of the second plaintiff. The third plaintiff is their son. The plaintiffs originally claimed NCR over a parcel of land measuring 27.9 acres. The said land is located in Pujut Sungei Adong, Miri. In the map marked as "A" and annexed to the statement of claim, the said parcel of land is divided into four "Field Lots". The first plaintiff, second plaintiff and third plaintiff claimed Field Lot 3, Field Lot 2, and Field Lot 1 respectively. The fourth lot, ie, Field Lot 4, is claimed by one Suhaili bin Seman in Suit 21-02-2009(MR)/2 which was consolidated with the instant suit. He died before the trial commenced. The administrator of his estate instructed his solicitors that the claim of Suhaili bin Seman be de-consolidated and discontinued. I granted the application to discontinue Suit 21-02-2009(MR)/2. By the time of the trial, the first plaintiff in the instant suit also passed away and his son, the third plaintiff was substituted as the administrator. At the outset of the trial, the third plaintiff sought leave to discontinue his own action. The court granted his application. The writ and statement of claim was

A subsequently amended pursuant to the discontinuance of the action by the third plaintiff. During the trial, the second plaintiff did not appear in court to prove her claim. Her counsel submitted that she must be taken to have abandoned her claim. In the premises, the trial only proceeded in respect of the claim of the first plaintiff which is in respect of Field B Lot 3 which measures 9.93 acres. This claim was prosecuted by the third plaintiff in his capacity as administrator of the estate of the first plaintiff.

[3] The pleaded case of the first plaintiff is as follows. He is an Orang Merek, ie, an original indigenous inhabitant of the Miri Division C of Sarawak. He inherited the NCR land from his ancestors in Pujut Sungei Adong. The entire NCR area is marked and edged in red in the map "A" attached to the statement of claim. However, the first plaintiff is only claiming Field Lot 3. It is pleaded in para. 4.1 that the first plaintiff's great grandfather, Serudin bin Abdullah was the first person D who entered the area in 1908 and cleared the land. He built a house and cultivated the land. When Serudin bin Abdullah passed away around 1920, the land was handed down to the first plaintiff's grandfather, ie, Tusin bin Serudin. Tusin bin Serudin had five children. One of the five children was Gani bin Tusin who is the father of the first plaintiff. Tusin E bin Serudin passed away in 1932 and the land was inherited by Gani bin Tusin. Gani bin Tusin had nine children and one of them was the first plaintiff who was born in 1932. Gani bin Tusin passed away around the same time and the first plaintiff was looked after by his brother, Tabing bin Gani who inherited the said NCR land. The first F plaintiff continued to live on the land. When Tabing bin Gani passed away around 1963, the first plaintiff inherited the land. He continued to occupy and cultivate the land. He started a family in 1966 after marrying the second plaintiff. In 1995, the first plaintiff divided the land into Field Lots 1, 2 and 3 as shown in Map "A". He gifted two lots to his wife and son. Between 1996 and 2004 the first plaintiff had G applied to the authorities for title to be issued but was unsuccessful. He was later informed that the said land over which he claimed NCR is within Lot 4281, Block 10, Kuala Baram District and that it belonged to the first defendant.

H **[4]** During the trial, six witnesses ie, Mohamed Ali bin Sapiee (PW1), Indin anak Bagi (PW2), Abdullah bin Yusof (PW3), Razli Kabusang (PW4), Juli bin Aris (PW5) and Mark Bujang (PW6) gave evidence on behalf of the first plaintiff. I shall summarise their evidence below.

I **[5]** PW1 is the son of the late first plaintiff. He works as a cement mixer. He lives on the disputed land with his aged mother, the second plaintiff. His father passed away in 2009. He said that between 1996

and 2004, the contractor of the first defendant company encroached into their NCR land and caused damaged to the trees and crops. His late father lodged a police report and managed to stop them. He then proceeded to relate the oral history of his ancestors in respect of the manner they acquired NCR over the land in dispute. It is as follows:

Q10: You have also said that your "temuda land" was given to the company without your knowledge. How did the land become "temuda land" of yourself and your parents?

A10: I only know the history of our occupation of the land from what my late father told me. He told me that my great great grandfather and his family first cleared the said lands (including the land presently occupied by me and my parents) in Sg Adong area sometime in the early 1900's. My ancestors then built their homes along the river and cultivated the land around them with such crops such as tapioca and yam and planted fruit trees. They continued to live there and the land passed on to my great grandfather and then to my grandfather and their families. They lived on the produce from the crops cultivated on the land and the fish and prawns from the river. After my grandfather passed away, the rights over the said lands were passed on to my late father and his family.

My ancestors included my uncle, Aris Bin Gani, who also lived in the same house but subsequently he moved to his own house in another parcel nearby. His son, Juli Bin Aris, who is much older than me is knowledgeable on the history of the land and he will give evidence on it.

[6] PW1 said that his late father had applied for the land to be surveyed and for title to be issued. PW1 together with his mother had also signed a letter addressed to the Superintendent of Lands and Surveys, Miri to claim the land. During cross-examination, he disagreed that his late father put in a claim for the land only in 1992. However, he agreed that he does not possess documents to prove lineage to Serudin bin Abdullah. PW1 said that he is also unaware that his late father's application for land title was rejected in 1999. He was also unaware that his late father had applied to the Lands and Surveys Department for land on the ground he does not have land of his own. He disagreed that his father came to cultivate the land only after 1958.

[7] PW2 (Indin anak Bagi) is a part time unregistered surveyor. He started work as a general worker with the Lands and Surveys Department in 1953. He retired as a demarcator in 1984. His job was to follow survey teams to survey and mark boundaries of land. He said that the late Sapiee bin Gani asked him to survey his temuda land at Sungei Adong. PW2 was paid RM1,000 for his services. The cadastral map he prepared is reduced to A4 size and attached to the statement of

claim. During cross-examination by counsel for the first defendant, PW2 agreed that he has no knowledge whether the late Sapiee bin Gani had acquired NCR over the land in question. PW2 also agreed that Razli Kabusang and Mark Bujang were "teaching" the plaintiffs to make a claim on the land in question. During re-examination, he said that by "teaching" he meant that the Razali Kabusang and Mark Bujang had asked for the identity card numbers and full names of the plaintiffs.

[8] PW3 (Abdullah bin Yusof) is a retired teacher. He is 69 years old. He also has an NCR claim in the same area. For this reason, counsel for first defendant submitted that he is an interested witness. PW3 said that when he was young, his family used to visit Sungei Adong. His mother's father and his uncle were friends of the late Sapiee bin Gani. He also knew Aris bin Gani who is the brother of the late Sapiee bin Gani. He said that in the 1950's, the late Sapiee bin Gani already had a farm in the area. PW3 is currently a Ketua Kaum in the area. He had studied the history and customs of the Orang Merek. He prepared and signed a document to confirm that the claim of the late Sapiee bin Gani for NCR over the land in question is legitimate. This document was submitted to the Lands and Surveys Department. During cross-examination, this witness agreed that he also has a 2.1 hectare NCR claim in the area. PW3 said, during cross-examination, that he had met Serudin bin Abdullah. He maintained this answer although it was pointed out that he was born in 1943 and that Serudin Abdullah died in the 1920's. However, he agreed that Mohammad Ali bin Sapiee was born in Marudi and that the late Sapiee bin Gani and his wife were in Marudi that time.

Q: I put it to you that this document will show even Sapiee Gani was in Marudi and his wife Mahani Binti Sidah were settled in Marudi and that is where Ali was born?

A: Yes.

Q: I put to you this document shows as at 1974, Sapiee Gani and his wife Mahani Sidah were in Marudi?

A: Yes.

Q: They were settled in Marudi?

A: Yes, at that time.

[9] PW4 (Razli bin Kabusang) was a close friend of the late Sapiee bin Gani. PW4 got acquainted with the late Sapiee bin Gani only in the mid-90s. He was even referred to as the "anak angkat" of Sapiee bin Gani. The late Sapiee bin Gani had complained to him that his land had been encroached and bulldozed by the contractor of the first defendant.

PW4 advised the late Sapiee bin Gani to demand compensation from the first defendant. He accompanied the late Sapiee bin Gani to collect compensation of RM22,000 from the first defendant's office in Miri in 1998. However, PW4 was not allowed to enter a room of the Naim Cendera office where the compensation money was paid to the late Sapiee bin Gani. PW4 was later told that the late Sapiee bin Gani had to sign some documents before he was paid the compensation of RM22,000. In 2004, PW4 noticed during a visit to the late Sapiee bin Gani's house, that a large area of the land had been cleared. PW4 advised the late Sapiee bin Gani to make a police report and take pictures of the damage caused by the first defendant. During cross-examination, PW4 denied that he was the one who prompted the late Sapiee bin Gani to make an NCR claim.

[10] PW5 (Juli bin Aris) is the nephew of the late Sapiee bin Gani and the cousin of Mohammad Ali bin Sapiee. His late father, Aris bin Gani was the elder brother of the late Sapiee bin Gani. He is a 69 year old farmer from Kampung Pujut Seberang. He said that he came to court to support the claim of the plaintiffs that they possess NCR over the land in question in Sungei Adong. He said that he was familiar with the history of the area as he was born and brought up in the area. He related the oral history told to him by his ancestors as follows:

> From what I was told by my late father, my great-great grandfather Serudin bin Abdullah (amended to Serudin bin Abbas) was the first person who fell and cleared the land sometime in or about 1908. He occupied the cleared land by building a house in which he resided with his family and planted padi, vegetables, and various fruit trees including embang, durian, pineapples, nangka, rambutan and terap. He also carried out fishing and caught prawns from the river. After he passed away, the rights created over the said land passed to my great grandfather, Tusin bin Serudin who continued to occupy the said land and to cultivate the same with padi, vegetables and fruit trees.
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> From my great grandfather, the land then passed to my grandfather, Gani bin Tusin sometime in 1932 who continued to occupy it with his family and to cultivate it. My grandfather had 9 children, namely, Tabing bin Gani, Tipah bte Gani, Aris bin Gani, Deris bin Gani, Abang bin Gani, Utit bin Gani, Taris bin Gani, Sayid bin Gani and Sapiee bin Gani. My late father was Aris bin Gani and he was born on the said land. My uncle, the late Sapiee bin Gani was also born on the said land in 1932. When my grandfather passed away, the rights created over the said land passed over to my eldest uncle Tabing bin Gani around 1936 and from him to my uncle Sapiee bin Gani who continued to occupy and cultivate the said land with his family including his brothers and sisters. Subsequently, my father moved out to set out his own farm and home in a nearby land although his wooden house remained and still is on the land. The land is presently occupied by my cousin, Mohd Ali and his mother.

[11] During cross-examination, PW5 denied that Mohammad Ali bin Sapiee is from Marudi. He said that the late Sapiee bin Gani and his wife were in Marudi after they married and that was the reason, Mohammad Ali bin Sapiee was born there. However, he agreed with counsel for first defendant that the land was not cleared by the late Serudin bin Abdullah but by Tusin bin Serudin. During cross-examination by counsel for the second and third defendants, PW5 could not explain why Mohammad Ali bin Sapiee referred to him as his uncle.

[12] The final witness for the plaintiffs was PW6 (Mark Bujang). He is not a registered surveyor but a community surveyor. He explained community mapping as follows:

> Community mapping is also known as a participatory mapping where local community members participate to demarcate and make maps to describe the place in which they live. The people who live and work in a place have the most intimate knowledge of the place. Only they are able to make a detailed and accurate map of their history, land use, way of life or vision for the future.

[13] PW6 said that he had been trained to produce maps using Geographical Information System (GIS). He has produced about 50 maps so far and his evidence has been accepted in a few NCR cases in the High Court. In January of 2012, he was approached by the solicitors of the plaintiffs to produce a map of the area in question. Aided by the survey map that was produced by PW2 (Indin anak Bagi), PW6 produced his GIS map using Global Positioning Equipment (GPS) and computer software. The final copy of the community map he produced is marked as "X". During cross-examination, counsel for first defendant put to him that the NCR claim is a recent claim because the boundary on the map is a straight line that follows the road. PW6 agreed with the suggestion. However, during re-examination, he said that he still believed the area is NCR land because the aerial photograph taken in 1948 showed a cleared area.

Case For The Defendants

[14] The first defendant called seven witnesses. Their case is that the first plaintiff did not settle in the area of dispute before 1958 but only came there in the 1970's. This was the reason why his son, Mohammad Ali bin Sapiee was born in Marudi and not in Miri. The plaintiff had also previously applied for land on the ground that he did not possess any land of his own. The first defendant called government functionaries such the Penghulu of the area and the former district officer to support their case that the first plaintiff has no land in the area and that he has been made use of by some people to stake a claim. The evidence of their witnesses can be summarised as follows.

[15] DW1 (Abdullah bin Julaihi) is an Assistant Director of Lands and Surveys. He was referred two letters that are in the possession of his department, ie, pp. 8 and 9 of bundle E. The letter at p. 9 of bundle E is an application to the Superintendent of Lands and Surveys by the late Sapiee bin Gani for land on the ground that he does not have any land of his own. The letter at p. 8 is the letter of the Superintendent rejecting the said application.

[16] DW2 (Johari bin Bujang) was the Divisional Development Officer at the Miri Resident's Office from June 1993 to December 1998. He was appointed as the District Officer of Miri from December 1998 to 14 March 2003. He said that the late Sapiee bin Gani met him a few times when he was the Divisional Development Officer in Miri in respect of his application for land. DW2 said that the late Sapiee bin Gani told him that he does not have any land of his own in the said area as he cultivated the land for a few years only. The late Sapiee bin Gani explained that his cultivation of the land was "tebasan" and this cannot be equated with acquisition of NCR over land. DW2 had also visited the house of the late Sapiee bin Gani regarding the land in question. He said that the house did not look as if it was built prior to 1958. During cross-examination, DW2 was emphatic that the late Sapiee bin Gani had told him "man to man", that he only came to the area in the 1970's.

[17] DW3 (Marzuki bin Olong @ Marzuki bin Sulong) is a land administrator employed by the first defendant. He received documents pertaining to NCR claim from Juli bin Aris and Tuan Hj Mat bin Sebli which he merely forwarded to his superior officers. During cross-examination, he said that he did not investigate the NCR claims.

[18] DW4 (Boniface Intang) is the present district officer of Miri. He tendered pp. 1-6 of bundle E which was in the possession of his department. It is letter written by one Nasiah binti Dahlan.

[19] DW5 (Mohamed bin Abang Othman) is the Pemancha for Miri Division. A Pemancha is a native chief who is higher in rank than the Ketua Kaum and the Penghulu. DW5 has been a Pemancha since 2008 and his area of jurisdiction is Miri. He testified that the Sg. Adong area is under the jurisdiction of Penghulu Haji Ahmad bin Haji Rahman. During cross-examination, he disagreed that the jurisdiction of Kampung Sungei Adong overlaps between the Penghulu of Pengkalan Lutong and Penghulu of Pujut Kerbau. He also disagreed that Penghulu Ibrahim Haji Karim who is the Penghulu of Pujut Kerbau area has jurisdiction over Sungei Adong area.

[20] DW6 (Hj Ahmad bin Raman) told the court that he was the Ketua Kampung for the Lutong area from 1995 to 2009. The Lutong area includes the Sungei Adong area in which the disputed land is located. He said that his father was the Ketua Kampung and Penghulu for the same area from 1955 to 1997. His father had told him that the disputed land in Sungei Adong was not cleared by the ancestors of the first plaintiff and Suhaili bin Seman and that the first plaintiff came to the area only in the 1970's. He also said that he is personally aware that the first plaintiff came to the area in the 1970's. During his visit to first plaintiff's house, he had also noted that the house was only built around the 1970's. During cross-examination, PW6 agreed that first plaintiff and his ancestors are Orang Merek. He agreed that Abdullah Yusof is the present Ketua Kaum for the Sungei Adong area. He disagreed that Seman bin Muda was the Ketua Kaum of Kampung Sg. Adong from the 1950's to the 1980's.

[21] DW7 (Hasmiah binti Anthony Hasbi) is the legal advisor of the first defendant. She joined the first defendant as an assistant company secretary in 2001 but left the company in 2006. When she rejoined the company in 2010 as senior legal officer, she was tasked with gathering documents to investigate the claim of the first plaintiff. She said that the first defendant was initially issued with Provisional Lease No. 4271 Block 10, Kuala Baram District which covered the area in question. This Lease was subsequently subdivided and the area in dispute now falls within Lot 3247. She said that the first defendant rejected the NCR claim of the first plaintiff and the others. She referred to a letter written by one Nasiah binti Dahlan on 26 August 1992. Nasiah binti Dahlan had been appointed as the secretary of a "Jawatankuasa sementara yang di lantik pada 2 Ogos 1992". The letter was addressed to the Miri District Officer. The letter states that the late Sapiee bin Gani had been cultivating the area in question for 15 years only. In view of the letter written by Nasiah binti Dahlan dated 26 August 1992, DW7 concluded that the NCR claim of the first plaintiff is false. She also referred to a letter signed by the first plaintiff on 17 October 2000. The letter stated that the first plaintiff was applying for land on compassionate (ehsan) grounds because he does not have any land in the area. She also referred to another letter signed by the late Sapiee bin Gani and addressed to the Chief Minister. In that letter it is stated that the ancestors of the first plaintiff had cleared the area in 1939. In the pleaded case of the plaintiffs it is stated that their ancestors cleared the land in 1908. DW7 also referred to another letter signed by Aris bin Gani, the uncle of the first plaintiff. This letter states that the land was first cleared by his father Gani bin Tusin in 1915. DW7 said that this statement also contradicts the pleaded case of the plaintiffs. She also referred to other letters that showed that many claimants had made

competing claims in the same area. The Ketua Kaum who certified the claims, ie, Abdullah Yusof (PW3), also had competing claims in the area. She said that one of their potential witnesses (Jali bin Abon), who is a relative of Mohammad Ali bin Sapiee, was told not to testify on behalf the first defendant.

[22] DW8 (Roslan bin Mohd Ramli) and DW9 (Unus bin Tambi) was called by the second and third defendant. DW8 is an Assistant Surveyor with the Lands and Surveys Department. He is also the Head of Aerial Photo Interpretation Unit (APIU), Photogrammetry Section of the Lands and Surveys Department. DW8 had previously given evidence on aerial photography interpretation in about half a dozen NCR cases in the High Court. He was asked to prepare a plan from the aerial photograph and locality plan of the disputed area. He prepared a report of his interpretation of the aerial photograph of the disputed area. The photographs were taken in 1947 and 1967. He said that based on the 1947 photograph, about 3.8 acres had been cleared in the area claimed by the first plaintiff. In 1961, the cleared area was about 4.5 acres. In respect of the area claimed by the second plaintiff and the original third plaintiff, there were no cleared areas. This is reflected in Appendix A of his report. During cross-examination, DW8 said that in his opinion, there wasn't any kind of settlement in the cleared area. He came to this conclusion because there were no houses in the cleared area. Furthermore the area was near to the river and thus erosion and flooding could have damaged the trees. He also said that NCR areas do not have a straight boundary and if there were houses, it would have been captured in the aerial photographs.

[23] DW9 is the Superintendent of Lands and Surveys, Miri Division since July 2011. One of his duties was the submission of NCR claims for approval to the Director of Lands and Surveys. He confirmed, from the records of his department, that a provisional lease was granted to the first defendant ie, No. 4271 Block 10, Kuala Baram Land District. This land was later converted into a Final Lease subdivided and replaced by Lot 4281 and Lot 6434 Block 10 Kuala Baram Land District. Lot 4281 was later further subdivided into Lot 3238 and Lot 3247. The disputed land is within Lot 3247. He also referred to a letter that the plaintiffs have addressed to his office on 17 October 2000. In that letter, the first plaintiff had applied for land on the ground that he did not possess any land of his own. DW9 said that his letter explained the position of the plaintiffs with regard to the land in issue. During cross-examination, he denied that this reliance on the said letter was merely an afterthought to justify his failure to investigate and extinguish the NCR claim of the plaintiffs.

A **Issues**

[24] The principal issue in this case is whether the first plaintiff had acquired NCR over the disputed land in question, ie, the so-called Field Lot 3 which measures 9.93 acres. The subsidiary issues would be:

B
1. Whether the ancestors of the first plaintiff had cleared and cultivated the area before 1 January 1958?

2. Whether first plaintiff's witnesses had given sufficient oral history evidence or documentary evidence to prove the above issue on a balance of probabilities?
C

3. Whether the letter signed by the first plaintiff saying that he does not possess any land is conclusive against his case?

4. Whether the said letter is admissible in evidence?

D
5. Whether the aerial photograph evidence is in favour of the first plaintiff's case?

Decision

E **[25]** It is not disputed that the 9.93 acres of land claimed by the plaintiff is within Lot 3247 which had been alienated to the first defendant. Regardless of the alienation of the land to the first defendant, it is trite law that the primacy of pre-existing native customary rights must be respected unless it has been extinguished in accordance with the Sarawak Land Code. It is common ground that there was no
F extinguishment of NCR in the instant case. The first plaintiff can succeed in this claim only if he can proof on a balance of probabilities that the land in question is NCR land that belongs to him. In the instant case, the burden lies on PW1 who is pursuing the claim as the administrator of the estate of his father. Now, a claim for NCR in
G Sarawak, as noted by Rhodzariah Bujang J in *Jimi Mantali & Ors v. Superintendent of Lands & Surveys Samarahan Division & Anor* [2011] 1 CLJ 1000 is easy to make and open to abuse. This is because the Sarawak Land Code recognises NCR if natives can prove that they have been in continuous occupation of their land prior to 1 January 1958.
H Therefore, NCR land is land that had been cleared and farmed by a pioneering ancestor a few generations ago. As written records evidencing such settlement would be hard to come by, the only way that natives can prove their claim that they have acquired NCR is by relying on their customs, traditions and oral history. This type of evidence, though
I strictly speaking constitutes hearsay evidence, has been accepted by the court. Similarly in the instant case, PW1 has not produced a shred of documentary evidence that his ancestors had cleared and cultivated the

land in question prior to 1958. In my view, the absence of documentary evidence is not fatal by itself. However, the oral evidence tendered by PW1 and his witnesses should be reliable and persuasive. PW1 bears the burden to prove to the court on a balance of probabilities that his ancestors had cleared the land before 1958 and that his family had been in continuous occupation until present time. After having scrutinised the evidence of PW1 and that of his witnesses, I am of the view that they are neither reliable nor persuasive. Furthermore, the oral evidence even contradicts the pleaded case. Finally, although there is no burden on a defendant to disprove the case for the plaintiff, the evidence of the first defendant's witnesses in the instant case clearly rebuts the pleaded case of the first plaintiff.

Inconsistent Oral Evidence

[26] The pleaded case of the first plaintiff is that sometime in 1908, the first plaintiff's grandfather, Serudin bin Abdullah was the first person who fell and cleared the land in question in the area now called as Pujut Sungei Adong. Although, documentary evidence in respect of the settlement of NCR land would not be available, PW1 failed to tender any documents proving lineage to Serudin bin Abdullah. In fact, during cross-examination, PW1 himself was not completely certain if he was a descendant of Serudin bin Abdullah. He said as follows during cross-examination by counsel for first defendant:

> Q: I put it to you that you have no ancestral claims and links to Serudin Abdullah because your father never told you?
>
> A: I do not know.

[27] This part of the cross-examination was not clarified during re-examination. When PW1 was cross-examined by counsel for first defendant about the letter that the first plaintiff wrote to the Lands and Surveys Department to apply for land, he again was not on firm ground about his father's claim to NCR over the land in question. This is what he said:

> Q: I refer you to page 8 of Bundle B, this was in 1999, your father has been informed by Lands and Surveys Department that his application together with rakan rakan tidak dapat di pertimbangkan, you know about it?
>
> A: I do not know.
>
> Q: You don't know because you also don't know whether father has any genuine NCR over land in question?
>
> A: **Don't know**. (emphasis added)

[28] When PW1 was shown a letter of appeal signed by his father and addressed to the Chief Minister that stated that the land in question was cleared in 1939, PW1 again was not sure when his father first made a claim on the land. This is what he said:

> Q: See page 10, by 1939, your father was 7 years old?
>
> A: I do not know the story.
>
> Q: I put it to you that you don't know the story when your late father made claim on this land?
>
> A: Yes, I don't know.

[29] PW1 told the court that a documentary record evidencing the connection of his family with Serudin bin Abdullah was with his cousin, Juli bin Aris. His evidence is as follows:

> Q: During cross-examination when you were asked if there were any records that connect you to Serudin Abdullah, you said yes, and there is a letter with your brother. Can you tell the court who is your brother who has the letter?
>
> A: Juli bin Aris.

[30] However, no documentary record connecting the first plaintiff to Serudin bin Abdullah was produced. In respect of the corroboration of the oral history evidence, PW1 called PW3 and PW5 to the witness stand. However, instead of corroborating PW1's evidence that his family has been in continuous occupation of the land since it was cleared before 1958, the evidence of these witnesses have cast a serious doubt on the authenticity of his claim. PW3 who is 69 years old said that the first plaintiff had a farm in the area in the 1950's and that he used to visit him. As the present Ketua Kaum (native chief) of the area, PW3 even signed a letter to verify the NCR claim of the first plaintiff. However, PW3's veracity as a witness was put in doubt when he insisted, despite repeated questioning, that he had met Serudin bin Abdullah who was the alleged pioneering ancestor of the first plaintiff. The evidence of PW1 is that Serudin bin Abdullah died in the 1920's. It is a matter of record that PW3 was born in 1943. PW3 also suggested that the first plaintiff was not in continuous occupation of their land. He agreed with counsel for first defendant that during the 1970's, the first plaintiff and his family had settled in Marudi and that PW1 was born there. The other crucial witness that was called to support the oral evidence of PW1 was PW5. However, he fared no better than PW3 in terms of providing corroboration to strengthen a claim based purely on oral history. He is the cousin of PW1 and, therefore, one would expect him to relate the same family history in respect of their pioneering ancestor in question,

ie, Serudin bin Abdullah. However, PW5 said that the pioneering ancestor who cleared the land was Serudin bin Abbas. During cross-examination, PW5 even agreed with counsel for first defendant that the land was not cleared by Serudin bin Abdullah but by Tusin. The pleaded case of the first plaintiff and the evidence of PW1 is that it is Serudin bin Abdullah who cleared the land. The pleading was never amended by the plaintiffs with the result that the oral evidence of PW5 contradicts the pleaded case for the first plaintiff and the evidence of PW1. The case of the plaintiffs, with the exception of the aerial photographs which I shall advert to later, is based purely on the oral evidence of PW1, PW3 and PW5. In view of the material inconsistencies in their evidence, in my view, it is not safe to rely on the narration of their oral history to hold that the first plaintiff has established NCR over the land. Finally it must be mentioned also that the mother of PW1, ie, the second plaintiff did not take the witness stand. As the wife of the late first plaintiff, she would be in a position to corroborate the claim of the first plaintiff. She did not come to court and PW1 did not explain why his mother did not take the witness stand.

Aerial Photograph Evidence

[31] The first plaintiff did not call any expert to interpret the aerial photographs that were tendered in evidence. However, the second and third defendants called an expert in the person of DW8 from Lands and Surveys Department. DW8 said that in the 1947 photograph about 3.8 acres has been cleared in the land in question. This clearing had increased to 4.5 acres in 1961. However, the cleared area depicted in the aerial photograph is not sufficient evidence to support the claim of the first plaintiff for two reasons. DW8 did not conclude that the aerial photographs indicated settlement as houses were not shown in the photographs. It must be pointed out that there is no evidence at all that the present houses on the land existed from before 1958. DW2, the former Divisional Development Officer had said that he had inspected the houses and the farm and they were of more recent origin. DW8 also said that the area was near to a river and, therefore, erosion and flooding could have damaged the trees. He said as follows during cross-examination by counsel for first defendant:

> Q: May I draw your attention to pages 17 and 18 of Bundle F, look at patch in yellow where you described in your report as cleared area, does it mean there was some kind of settlement, people living there?
>
> A: No.
>
> Q: Why you say no?

A: Because no houses in the cleared area and maybe because of erosion, near to the river, flooding area, so trees could be damaged.

Q: Cleared area, if for farming, or for NCR, it should not have such a straight boundary?

A: Yes, I agree.

Q: I put it to you that, at page 18, the cleared area as shown here could not have been used for farming because the boundaries are so straight, cannot be NCR there?

A: Yes, I agree.

Q: If native customary practices, boundary would be uneven?

A: Yes, not straight.

Q: Normally aerial photography can capture houses, and show people living there?

A: Yes.

Q: You say on pages 17 and 18 no houses there?

A: Yes.

[32] The second reason is that even if the aerial photographs depicted settlement prior to 1958, the salient point to note about this case is that it is not a communal claim. It is an individual claim. The first plaintiff has to prove that his family had been in continuous occupation of the land from before 1958. PW1, who prosecuted the claim as the administrator of the first plaintiff, failed to prove this fact on a balance of probabilities. As I have noted earlier, his witnesses (PW3 and PW5) had contradicted the pleaded case of the first plaintiff. PW5 had agreed that the family of the PW1 had settled in Marudi in the mid 1970's. It is undisputed that PW1 was born in Marudi according to his birth certificate. Therefore, even if some remote ancestor had cleared the land in question, PW1 and his family had not been in continuous occupation of the land since before 1958. However, I hasten to add that PW1 had not tendered cogent and consistent oral history evidence through his witnesses to prove that it was his ancestor who had occupied and cleared the land from before 1958. In the premises, at best, the aerial photographs only show that part of the disputed land had been cleared. There is no evidence that it was cleared by the family of PW1 in this case. This type of evidence was considered by Rhodzariah Bujang J in *Jimi Mantali & Ors v. Superintendent of Lands and Surveys & Another (supra)* as follows:

> Put in another way, the evidence of the aerial photograph of 1951 is capable of two equal interpretations ie that the plaintiffs cultivated the said land and Wee Kheng Chiang & Co Ltd cultivated it too. Both are probabilities and Mr See Chee How's quotation from the judgment of Denning J in *Miller v. Minister of Pensions* [1947] 2 All ER 372 lifted from the judgment of Ian Chin J in *Noel Kenneth Davidson v. Firm Corporation Sdn Bhd* [1994] 2 CLJ 637; [1994] 2 MLJ 40 at p. 47 shows that when probabilities are equal, the burden of proof on the plaintiff to prove his case is not discharged.

[33] Similarly in the instant case, the mere fact that the land had been cleared is not proof that PW1's ancestors had cleared and cultivated the land from before 1958.

Defendant's Evidence That First Plaintiff Settled In Sungei Adong, Miri, In The Mid-1970's

[34] DW2, the former District Officer of Miri, gave direct and convincing evidence that the first plaintiff came to the area in the 1970's. He said that the first plaintiff sought his advice on several occasions when he was the Divisional Development Officer to apply for land in the disputed area. The first plaintiff told DW2 that he only came to the area in 1976. This is the reason why DW2 advised the first plaintiff to negotiate for compensation only from the first defendant. The first plaintiff eventually obtained compensation of RM22,000 from the first defendant. However, PW1's case is that the compensation of RM22,000 was for damages caused to the crops and trees on the land. The evidence of DW2 on this point is as follows:

> Q: I put it to you that your statement that Sapiee Gani had told you that he had only occupied the land for cultivation since the 1970's cannot be true as the land had been cleared by his ancestors long before 1.1.58, agree or disagree?
>
> A: Disagree because I was absolutely sure that Sapiee Gani told me man to man that he came to the area in 1970's. That is exactly what he said and I said so in my witness statement.
>
> Q: I put it to you that your statement Sapiee Gani had no NCR over the land in question cannot be true because at all material time, before he died, he had been asserting his NCR over the land by stopping trespass by first defendant, lodging police report and taking matter to court?
>
> A: Cannot agree because I believe he has truthfully told me that he occupied and cultivated the land only in the 1970's.

[35] I find that the evidence of DW2 is plausible and credible. He was the Divisional Development Officer at that time and there is no reason to disbelieve him that the first plaintiff had sought his help to apply for land. It is supported by other evidence. PW5 confirmed that the first

plaintiff had settled in Sungei Adong, Miri, in the mid 1970's. Furthermore, the evidence of DW2 is also strongly corroborated by a letter signed by one Nasiah binti Dahlan on behalf of the other 118 land applicants. One of the names in the annexure is that of the first plaintiff. In that letter dated 26 August 1992, it is stated that the first plaintiff had been cultivating the land in question for only 15 years. It says as follows:

> … Tuan, kami sudah pun lama bercucuk-tanam di tempat kawasan ini. Seperti Encik Sapiee b.Gani, Atek b. Taher sudahpun ada berumah tangga di tempat ini lebih kurang 15 tahun sudah …

[36] In another letter written on 17 October 2000 to the Superintendent of Lands and Surveys of Miri, the first plaintiff had applied for land on compassionate ("ehsan") grounds. In part, it reads as follows:

> Per: Permohonan Ehsan untuk Tanah Perkebunan
>
> Kami adalah pekebun yang bergantung hidup sepenuh masa hasil daripada perkebunan. Malang sekali kami tidak mempunyai tanah kami sendiri yang tetap, yang mana ramai daripada kami menggunakan tanah orang lain bagi tujuan tersebut ...

[37] In my view the above letter conclusively disproves the case of the first plaintiff that he possessed native customary rights on the land in question. If the first plaintiff possessed NCR land in the area in question, it would be totally unnecessary to state that he does not have any land of his own and was cultivating on land belonging to others. It is also my view that this letter is admissible in evidence as it was produced from the records of the Lands and Surveys Department. I am mindful that the counsel for plaintiff only agreed as to its existence and not the contents. However, the contents of the letter are consistent with the evidence of PW5 and DW2 that the first plaintiff came to the area in question only in the mid 1970's.

Allegation Of Impropriety

[38] I do not propose to deal at length with this matter. During the course of the trial, counsel for first defendant submitted that his client had seen the lead counsel for the first plaintiff in a coffee shop where his chambering student was seated with PW1 and PW3. Lead counsel for first plaintiff explained that he did not enter the coffee shop upon seeing his chambering student with PW1 and PW3 to avoid a wrong impression. This is how lead counsel for first plaintiff explained the matter in open court:

> I followed my son in a car to meet up with Guruvir, my chambering student at restaurant. When I went there, my chambering student was with the witnesses, PW1 and Abdullah. When I saw PW1 at restaurant, in order to avoid wrong impression, I left. I did not enter restaurant. I phoned Guruvir about it and saw him later. My request for exercise was at 5 p.m., court finished late at 5.30 p.m., so did not go for exercise.

[39] Learned counsel for first defendant replied that he would not pursue the matter any further and that he only wanted to place it on record. This is what he said:

> I will not pursue matter further, not my intention to cause embarrassment to anyone, wanted to put on record.

[40] However, he has raised the matter in his final submission. In my view, it is completely unnecessary to deal with this complaint as there is no evidence at all that counsel for first plaintiff had coached his witnesses. Furthermore, counsel for first defendant had said during the trial that he would not pursue the matter.

Conclusion

[41] The case for the first plaintiff is almost entirely based on oral history. It is an individual claim for NCR land. Evidence of oral history is acceptable in NCR cases. However, the oral evidence tendered by PW1 and the other relevant witnesses are not consistent or reliable. The aerial photographs do not prove settlements from before 1958. Even if it established that fact, it does not necessarily mean that the first plaintiff's ancestors had cleared the land. Finally, the evidence of DW2 (the former district officer) and the letters written by Nasiah binti Dahlan and the first plaintiff casts serious doubt on the claim of the first plaintiff.

[42] For all the above reasons, I dismiss the claim of the first plaintiff. The counterclaim of the first defendant relates to costs of defending the claim and, therefore, is a matter to be addressed when assessing costs. I, therefore, dismiss the counterclaim of the first defendant. My order of costs are as follows:

(1) The plaintiffs are to pay costs of RM10,000 to the first defendant; and

(2) The plaintiffs are to pay another set of costs in the sum of RM10,000 to the second and third defendant.